

**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc. DISTRICT COURT  
SIXTH DIVISION**

**Jeffrey Tanner** :  
 :  
**v.** : **A.A. No. 14 - 060**  
 :  
**Department of Labor and Training,** :  
**Board of Review** :

## ORDER

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED,  
that the Findings & Recommendations of the Magistrate are adopted by reference as the  
Decision of the Court and the decision of the Board of Review is AFFIRMED.

Entered as an Order of this Court at Providence on this 9<sup>th</sup> day of January, 2015.

By Order:

/s/  
Stephen C. Waluk  
Chief Clerk

Enter:

/s/  
\_\_\_\_\_  
Jeanne E. LaFazia  
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc. DISTRICT COURT  
SIXTH DIVISION

Jeffrey Tanner :  
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v. : A.A. No. 2014 – 060  
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Department of Labor and Training, :  
Board of Review :

**FINDINGS & RECOMMENDATIONS**

**Ippolito, M.** Mr. Jeffrey Tanner filed the instant complaint for judicial review of a final decision of the Board of Review of the Department of Labor and Training, which held that he was not entitled to receive employment security benefits based upon proved misconduct. This matter has been referred to me for the making of Findings and Recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. Employing the standard of review applicable to administrative appeals, I find that the decision of the Board of Review is supported by substantial evidence of record and was not affected by error of law; I therefore recommend that the decision of the Board of Review be AFFIRMED.

# **I**

## **FACTS AND TRAVEL OF THE CASE**

The facts and travel of the case are these: Claimant was employed for two years by Packaging Graphics LLC. His last day of work was October 8, 2013. He filed a claim for unemployment benefits but on November 18, 2013, a designee of the Director of the Department of Labor and Training determined him to be ineligible to receive benefits pursuant to Gen. Laws 1956 § 28-44-18 — based on a finding that he was discharged for proved misconduct.

Mr. Tanner filed an appeal and a hearing was held before Referee Nancy L. Howarth on January 13, 2014. On January 17, 2014, the Referee held that Mr. Tanner was disqualified from receiving benefits because Packaging Graphics had proven misconduct. In her written Decision, the Referee made Findings of Fact, which are quoted here in their entirety:

The claimant was employed as a dye maker by the employer. The employers' policy required that employees punch out when taking breaks and that they must not leave the building without authorization. The claimant had received a copy of the policy and signed a written acknowledgement of receipt on October 12, 2011. He received a warning for a violation of this policy on August 24, 2012. On September 9, 2013 a human resources representative observed the claimant down the street from the employer's building entering a liquor store during his shift. On

the following day she reviewed the claimant's time records and determined that he had not punched out prior to leaving the building. A meeting was held with the claimant, the human resources representative and the human resources director on October 8, 2013. The claimant admitted that he had left the building without punching out. Since he had received a prior warning and was aware of the policy, the claimant was suspended with pay that day. He was discharged the following day for violation of the employer's policy. Other employees had been terminated under similar circumstances.

Decision of Referee, January 17, 2013 at 1. Based on these facts — and after quoting extensively from Gen. Laws 1956 § 28-44-18 — the Referee pronounced the following conclusions:

\* \* \*

The burden of proof in establishing misconduct rests solely with the employer. In the instant case the employer has sustained its burden. The evidence and testimony presented at the hearing establish that the claimant's actions constitute a knowing violation of a reasonable and uniformly enforced policy of the employer and, therefore, misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, January 17, 2014 at 2. The Claimant appealed and the Board of Review reviewed the matter.

Then, on February 26, 2014, the members of the Board of Review affirmed the decision of the Referee and held that misconduct had been proven. The Board found the decision of the Referee to be a proper

adjudication of the facts and the law applicable thereto and adopted the Referee's decision as its own. Decision of Board of Review, February 26, 2014 at 1. Mr. Tanner filed a complaint for judicial review of the Board's decision in the Sixth Division District Court on April 23, 2014.

## II

### APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically addresses misconduct as a circumstance which disqualifies a claimant from receiving benefits; Gen. Laws 1956 § 28-44-18, provides:

**28-44-18. Discharge for misconduct.** — An individual who has been discharged for proved misconduct connected with his or her work shall become ineligible for waiting period credit or benefits for the week in which that discharge occurred and until he or she establishes to the satisfaction of the director that he or she has, subsequent to that discharge, had at least eight (8) weeks of work, and in each of that eight (8) weeks has had earnings of at least twenty (20) times the minimum hourly wage as defined in chapter 12 of this title for performing services in employment for one or more employers subject to chapters 42 – 44 of this title. Any individual who is required to leave his or her work pursuant to a plan, system, or program, public or private, providing for retirement, and who is otherwise eligible, shall under no circumstances be deemed to have been discharged for misconduct. If an individual is discharged and a complaint is issued by the regional office of the National Labor Relations board or the state labor relations board that an unfair

labor practice has occurred in relation to the discharge, the individual shall be entitled to benefits if otherwise eligible. For the purposes of this section, “misconduct” is defined as deliberate conduct in willful disregard of the employer's interest, or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence. Notwithstanding any other provisions of chapters 42 – 44 of this title, this section shall be construed in a manner that is fair and reasonable to both the employer and the employed worker.

In the case of Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984), the Rhode Island Supreme Court adopted a definition of the term, “misconduct,” in which they quoted from Boynton Cab Co. v. Newbeck, 237 Wis. 249, 296 N.W. 636, 640 (1941):

‘Misconduct’ \* \* \* is limited to conduct evincing such willful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employee’s duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed ‘misconduct’ within the meaning of the statute.

The employer bears the burden of proving by a preponderance of evidence that the claimant’s actions constitute misconduct as defined by law.

Traditionally, only deliberate conduct that was in willful disregard of the employer's interest could constitute misconduct under the Employment Security Act. See Gen. Laws 1956 § 28-44-18. However, a number of years ago the legislature amended § 28-44-18 to permit, in the alternative, a finding of misconduct to be based on the violation of a rule promulgated by the employer —

... “misconduct” is defined as ... a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence. ...

Gen. Laws 1956 § 28-44-18 as amended by P.L. 1998, ch. 401, § 3. Note the elements of the new standard: (1) the rule must be violated knowingly, (2) the rule must be reasonable, (3) the rule must be shown to be uniformly enforced, and (4) the employee must not have violated the rule through incompetence.

### **III STANDARD OF REVIEW**

The standard of review is provided by Gen. Laws 1956 § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

#### **42-35-15. Judicial review of contested cases —.**

\* \* \*

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court “\* \* \* may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are ‘clearly erroneous.’”<sup>1</sup> The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.<sup>2</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>3</sup>

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<sup>1</sup> Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

<sup>2</sup> Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

<sup>3</sup> Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). Also D’Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I.1986).

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964) that a liberal interpretation shall be utilized in construing the Employment Security Act:

\* \* \* eligibility for benefits is to be determined in the light of the expressed legislative policy that “Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family.” G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

#### **IV**

#### **ANALYSIS**

#### **A**

#### **Factual Review**

The hearing conducted by Referee Howarth began with the usual housekeeping matters, including — the administration of the oath to the witnesses (Referee Hearing Transcript I, at 2-3), the enumeration of exhibits

that had been transmitted from the Department as part of the record (Referee Hearing Transcript I, at 3-7), and a discussion of the order of proof. (Referee Hearing Transcript I, at 7). These preliminaries done, the testimony began.

1

**Testimony of Ms. Ramos**

At the initial hearing before the Referee on July 15, 2013, the employer presented one witness — Ms. Magdalena Ramos, its HR Generalist. Referee Hearing Transcript, at 1, 7 *et seq.*

Ms. Ramos testified that the employer has promulgated (and implemented) two policies — (1) hourly employees are not allowed to leave the building during their shifts, even on breaks, and (2) if they do leave the building, they must clock out. Referee Hearing Transcript, at 8-9.<sup>4</sup> She testified that the rule was enforced in other cases as well. Referee Hearing Transcript, at 14.

Turning to the events that led to Mr. Tanner's termination, Ms. Ramos testified that during the late afternoon of September 30, 2013, while on her way home, she observed Mr. Tanner entering a liquor store seven or eight

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<sup>4</sup> See also Employer's Exhibit No. 2.

streets away from the employer's premises during his working hours. Referee Hearing Transcript, at 8-10.<sup>5</sup> The next day, she checked his time card and found he had not clocked out. Referee Hearing Transcript, at 10.

Ms. Ramos explained that the accuracy of the time cards was important because they charge their clients according to the time spent. Referee Hearing Transcript, at 11. She said that Mr. Tanner was aware of their policy — in fact, he had signed to acknowledging receipt of it. Referee Hearing Transcript, at 15.<sup>6</sup> And he had previously been given a warning. Referee Hearing Transcript, at 12, 17-18.<sup>7</sup>

Consequently, Ms. Ramos and Mr. Mark Lima, the HR Director, had a conversation with Mr. Tanner about procedures, and he was placed on paid suspension. Referee Hearing Transcript, at 12, 17. And, according to Ms.

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<sup>5</sup> Ms. Ramos said that Mr. Tanner works the 3:00 p.m. to 11:00 p.m. program shift, and that this event occurred at 5:17 p.m. Referee Hearing Transcript, at 9.

In answer to a question from Mr. Tanner, Ms. Ramos acknowledged she did not videotape the incident. Referee Hearing Transcript, at 18-19.

<sup>6</sup> See also Employer's Exhibit No. 2.

<sup>7</sup> See also Employer's Exhibit No. 1.

Ramos, Mr. Tanner admitted he was wrong. Referee Hearing Transcript, at 14-15. The next day, he was terminated. Referee Hearing Transcript, at 12, 17.

## 2

### **Testimony of Mr. Tanner**

Next, the Claimant, Mr. Jeffrey Tanner testified. Referee Hearing Transcript, at 19 et seq. He stated that he was a die maker. Referee Hearing Transcript, at 23. He was not clear on the dates — though he remembered meeting with Ms. Ramos and being suspended. Referee Hearing Transcript, at 23-24. He said he admitted to the behavior because he thought if he went along with it he would not lose his job. Referee Hearing Transcript, at 24. He also conceded he had been warned previously. Id.

As to the incident, Mr. Tanner did not remember it happening. Referee Hearing Transcript, at 25. He believes he was “set up,” though he told the Referee he was speculating in this regard. Referee Hearing Transcript, at 25.

## **B**

### **Rationale**

The issue before the Court is straightforward — Was Claimant properly disqualified from receiving unemployment benefits because he was

absent from the workplace while on the time-clock? Based on the facts outlined above, I believe the answer to this question must be yes.

The Board of Review found that Claimant violated the Employer's workplace rules. In so finding the Board could well rely on the testimony of Mr. Ramos, which provided competent evidence of (1) the existence of the rule [by providing direct evidence of that fact], (2) that it was reasonable [especially in light of the fact that time-card records form the basis for client billings], (3) that Mr. Tanner violated it knowingly and intentionally [based on his prior warning], and (4) that it was uniformly enforced [by her testimony].

So, the decision of the Board of Review in this case must be upheld.

Pursuant to the applicable standard of review described *supra* at 6-8, the decision of the Board of Review must be upheld unless it was, *inter alia*, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. This Court is not permitted to substitute its judgment for that of the Board as to the weight of the evidence; accordingly, the findings of the agency must be upheld even though a reasonable fact-finder might have reached a contrary result. Applying this standard of review and the definition of misconduct enumerated in § 28-44-18, I must conclude that the Board's adopted finding that Claimant was discharged for proved

misconduct in connection with his work — i.e., his unmarked absence from the workplace — is not clearly erroneous in light of the reliable, probative and substantial evidence of record.

## V CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review is not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Furthermore, it is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Gen. Laws 1956 § 42-35-15(g)(5). Accordingly, I recommend that the decision of the Board of Review be AFFIRMED.

\_\_\_\_\_/s/  
Joseph P. Ippolito  
Magistrate  
January 9, 2015

